IN THE HIGH COURT OF DELHI

Crl.M.C. No.2737/2004

Anoop Jhalani ..... Petitioner

VERSUS

$ The State & Anr. ..... Respondents

Crl.M.C. No.2760/2004

Pradeep Jhalani ..... Petitioner

VERSUS

$ The State & Anr. ..... Respondents

Crl.M.C. No.2894/2004

Yogesh Jhalani & Anr. ..... Petitioners

VERSUS

$ The State & Anr. ..... Respondents

Crl.M.C. No.2895/2004

M/s.Jhalani Tools (India) Ltd. & Ors. ..... Petitioners

VERSUS

$ The State & Anr. ..... Respondents

Present : Mr.Anand Aggarwal for the petitioners.

Mr.U.L.Watwani for State.

Mr.S.B.Sinha and Mr.Sanjay Mishra for respondent No.2.

% DATE OF DECISION: 20.09.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.** (Oral)

1. Above captioned petitions arise out of the same complaint and the same summoning order hence all the petitions are being decided together.

2. Respondent No.2, M/s.Sabby Builders & Promoters Pvt. Ltd. filed a complaint under Section 138 read with Section 141 and 142 of the Negotiable Instruments Act 1881 alleging that M/s.Jhalani Tools (India) Ltd. (impleaded as accused No.1) had instructed the complainant to render services of settling its dues with banks and financial institutions. That in lieu of services rendered by it, a cheque in sum of Rs.7,30,50,000/- dated 24.5.2004 drawn on State Bank of India was issued in the name of the complainant. That when presented for encashment, the cheque was returned dishonoured with the advice 'account closed'. That in spite of calling upon the accused company to pay the amount under the cheque none was paid.

3. P.C.Jhalani, Y.C.Jhalani, Pradeep Jhalani, Sandeep Jhalani, Anoop Jhalani and Ashok Jhalani were impleaded as accused No.2 to 7 respectively. In the memo of parties to the complaint they were described as directors.

4. Only allegations against the directors of accused No.1 are as averred in para 2 of the complaint. The same reads as under:-

> "2. That the accused No.1 is the Limited Company and accused No.2 to 7 are the Managing Director and Directors of the said accused No.1, therefore all the accused persons are jointly and severally liable to the acts and deeds of the accused No.1, all the Managing Directors and directors are supervising the affairs of the accused No.1 actively."

5. After recording pre-summoning evidence, vide order dated 18.9.2004 learned Metropolitan Magistrate issued summons against all accused.

6. Pradeep Jhalani, accused No.4 seeks quashing of the complaint and summoning order vide Crl.M.C. No.2760/2004.

7. Yogesh Jhalani, accused No.3 seeks quashing of the complaint and the summoning order vide Crl.M.C. No.2894/2004. His co-petitioner is the company, accused No.1.

8. Anoop Jhalani, accused No.6 seeks quashing of the complaint and the summoning order vide Crl.M.C. No.2737/2004.

9. The company M/s.Jhalani Tools (India) Ltd., accused No.1, P.C. Jhalani, accused No.2, Yogesh Jhalani, accused No.3 and Ashok Jhalani, accused No.7 have joined as co-petitioners in Crl.M.C. No.2895/2004 while praying for quashing of the FIR and the summoning order.

10. I note that Yogesh Jhalani is a petitioner in 2 petitions.

11. From the averments against the directors of the company as averred in para 2 of the complaint, contents noted in

para 4 above, it is to be noted that the complainant has stated that accused No.2 to 7 are the managing director and directors of accused No.1. In said para it is thereafter averred that all the managing directors and directors are supervising the affairs of accused No.1.

12. It has not been stated as to who is the managing director and who are the directors. Even in the pre-summoning evidence led by means of an affidavit filed by Sanjay Sabharwal, director of the complainant, accused No.2 to 7 are stated to be the managing director and directors of accused No.1, without specifying as to who is the managing director and who are the directors.

13. It could be urged (an argument not advanced as a matter of fact) that since name of P.C. Jhalani was listed at serial No.2 of the accused persons immediately after the name of the company, reference to the managing director in the complaint has to be a reference to P.C.Jhalani.

14. But, it cannot be so, for the reason in the memo of parties in the complaint P.C. Jhalani has been described as a director of the company.

15. It is settled law that unless law makes him liable an individual is not vicariously liable for the act of another. Under the Negotiable Instruments Act 1881 the directors of a company are made vicariously liable because of Section 141 of the

Negotiable Instruments Act 1881.

16. A managing director would be vicariously liable because of the very nature of his office viz. as director managing the company.

17. As held in the decision reported as *SMS Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr.* AIR 2005 SC 3512, an actionable complaint under Section 138/141 of the Negotiable Instruments Act 1881 against directors of a company must contain the averments that the person described as the director of the company was in charge and was responsible to the company for the conduct of the business of the company at the time when the offence was committed.

18. In the latest decision on the issue pronounced by the Supreme Court reported as JT 2007 (9) SC 449, *K.Srikanth Singh vs. M/s.North East Securities Ltd.* it has been held that the averments in the complaint must bring out as to on what basis it is being alleged that the person concerned, as director of the company, was responsible for the conduct of the business of the company and was in charge of the affairs of the company.

19. In the decision reported as AIR 1983 SC 67, *MCD vs. Ram Kishan Rohatgi*, under noted averments in para 5 of the complaint were a subject matter of consideration by the Supreme Court:-

> "5. That the accused No.3 is the Manager of accused No.2 and accused Nos.4 to 7 are the

Directors of accused No.2 and as such they were in charge of and responsible for the conduct of business of accused No.2 at the time of sampling."

20. In para 14 and 15, their Lordships of the Supreme Court held as under:-

> "14. Reliance has been placed on the words 'as such' in order to argue that because the complaint does not attribute any criminal responsibility to accused Nos.4 to 7 except that they were in charge of and responsible for the conduct of the business of the company. It is true that there is no clear averment of the fact that the Directors were really in charge of the manufacture and responsible for the conduct of business but the words 'as such' indicate that the complainant has merely presumed that the Directors of the company must be guilty because they are holding a particular officer. This argument found favour with the High Court which quashed the proceedings against the Directors as also against the Manager, respondent No.1.
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> 15. So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (accused Nos.4 to 7) has been made out ex facie on the allegations made in the complaint and the proceedings against them were rightly quashed."

21. It is apparent that with reference to the use of expression 'as such' the Hon'ble Supreme Court held that it amounted to a presumption drawn by the complainant and not a

positive statement that the concerned director was in charge of and responsible for the conduct of the business of the company.

22. In the instant case, use of the word 'therefore' in para 2 of the complaint reveals that the complainant sought to fasten liability on the directors only on account of they being the directors. To put it differently, the complaint is founded on the basis that because certain persons are the directors of a company therefore they are jointly and severally liable for the acts of the company.

23. On this short ground alone, the petitions filed by accused No.2 to 7 have to succeed.

24. As regards accused No.1, learned counsel for the petitioners sought to urge that the complainant was not even incorporated when the transaction between the accused No.1 and the complainant was transacted.

25. This issue would require evidence to be led. One fact is not in dispute. The same is that accused No.1 had issued a cheque in the name of the complainant company. Prima facie, complainant existed when the transaction was transacted between the 2 companies.

26. The petitions accordingly stand disposed of by quashing the complaint and the summoning order dated 18.9.2004 against accused No.2 to 7.

27. The complaint and the summoning order dated

18.9.2004 are upheld vis-a-vis accused No.1.

28. No costs.

20th September, 2007 **(PRADEEP NANDRAJOG)**
DK **JUDGE**